Supreme Court, U.S.
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No. ——— OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1994

ROGER D. BRADLEY,

Petitioner,

v.

STATE OF WEST VIRGINIA,

Respondent.

Petition For Writ Of Certiorari To The Supreme Court Of Appeals Of West Virginia

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. WAS THE PETITIONER DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AND AN OPPORTUNITY TO HAVE HIS COUNSEL MAKE AN ARGUMENT ON THE LAW APPLICABLE TO THE CASE WHEN THE TRIAL COURT, AFTER MAKING A SIGNIFCANT CHANGE IN THE JURY INSTRUCTION THAT DEFINED THE ELEMENTS OF THE OFFENSE, REFUSED TO ALLOW PETITIONER'S TRIAL COUNSEL TO REARGUE THE CASE?

II. WAS THE PETITIONER DENIED THE DUE PROCESS OF LAW WHEN THE TRIAL COURT ADMITTED INTO EVIDENCE THREE (3) TAPE-RECORDED TELEPHONE CONVERSATIONS WHEN IT WAS EVIDENT THAT THE TELEPHONE CONVERSATIONS WERE INTERCEPTED IN VIOLATION OF APPLICABLE STATE LAW?

III. WAS THE PETITIONER DENIED A FAIR AND IMPARTIAL TRIAL WHEN THE TRIAL COURT, AT THE OUTSET OF THE TRIAL AND IN THE GIVING OF AN *ALLEN* INSTRUCTION, COMMENTED UPON THE COST TO THE STATE OF THE TRIAL?

IV. WAS THE PETITIONER DENIED THE DUE PROCESS OF LAW AND A FAIR AND IMPARTIAL TRIAL WHEN THE JURY WAS GIVEN ACCESS TO A DICTIONARY DURING DELIBERATIONS?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW i

TABLE OF AUTHORITIES iv

JURISDICTIONAL STATEMENT 1

THE CONSTITUTIONAL PROVISIONS RELIED UPON 1

STATEMENT OF THE CASE 3

STATEMENT OF FACTS 5

ARGUMENT 15

I. DENIAL OF THE RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL AND TO HAVE COUNSEL MAKE A CLOSING ARGUMENT ON THE LAW APPLICABLE TO THE CASE 15

II. DENIAL OF THE DUE PROCESS OF LAW BY THE ADMISSION INTO EVIDENCE OF TAPE-RECORDED TELEPHONE CONVERSATIONS THAT WERE INTERCEPTED IN VIOLATION OF APPLICABLE STATE LAW 20

III. THE DENIAL OF A FAIR AND IMPARTIAL TRIAL DUE TO THE TRIAL COURT'S CONCERN WITH THE COST OF THE TRIAL 22

IV. THE DENIAL OF A FAIR AND IMPARTIAL TRIAL, AND JURY DELIBERATIONS BASED ONLY UPON EVIDENCE WITH WHICH THE PETITIONER WAS CONFRONTED IN OPEN COURT, BY THE JURY'S USE OF A DICTIONARY 23

CONCLUSION 25

TABLE OF CONTENTS – Continued

Page

APPENDIX:

Final Order, West Virginia Supreme Court of Appeals ..... App. 1

Circuit Court Sentencing Order ..... App. 2

TABLE OF AUTHORITIES

Page

CASES

Brittle v. Commonwealth, 281 S.E. 2d 889 (VA., 1981) 24, 25

Herring v. New York, 422 U.S. 853, 45 L.Ed. 2d 953, 95 S. Ct. 2550 (1975) 17

Loveless v. United States, 260 F. 2d 487 (C.A.D.C., 1958) 16

State v. Boggs, 103 W. Va. 641, 138 S.E. 321 (1927) 19

State v. Garrett, 182 W. Va. 166, 386 S.E. 2d 823 (1989) 21

United States v. Bonham, 772 F. 2d 1449 (C.A. 9, 1985) 23

United States v. King, 650 F. 2d 534 (C.A. 4, 1981) 18

United States v. Sawyers, 423 F. 2d 1335 (C.A. 4, 1970) 23

United States v. Stollings, 501 F. 2d 954 (C.A. 4, 1974) 23

United States v. Walls, 443 F. 2d 1220 (C.A. 6, 1971) 16, 17

Wallis v. State, 546 S.W. 2d 244 (Tenn. 1977) 18

Yopps v. State, 228 Md. 204, 178 A. 2d 879 (1962) 17

STATUTES

28 USC SECTION 1257(a) 1

WEST VIRGINIA CODE, 61-5A-3 1

WEST VIRGINIA CODE, 62-12-7a 4

WEST VIRGINIA CODE, 62-1D-3 20

WEST VIRGINIA CODE, 62-1D-6 20

WEST VIRGINIA CODE, 62-1D-9 20

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTION OF THE UNITED STATES

AMENDMENT V 1

AMENDMENT VI 2, 17, 19

AMENDMENT XIV 2, 17

LEGAL TREATISE

75B AMERICAN JURISPRUDENCE, SECOND TRIAL, SECTIONS 1560-1561 24

JURISDICTIONAL STATEMENT

Petitioner Roger D. Bradley was indicted in a ten (10) count felony indictment charging violations of *West Virginia Code, 61-5A-3.* He was found guilty of the charges contained in one (1) count of the indictment. His direct appeal from said conviction was denied by the West Virginia Supren Court of Appeals on May 3, 1993. Under the Rules of that Court no motion for rehearing is permissible. This Court's jurisdiction to review the decision of the West Virginia Supreme Court of Appeals is conferred by *28 USC Section 1257(a)* which reads, in pertinent part, as follows:

Section 1257. State Courts; certiorari

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari . . . where any title, right, privilege, or immunity is specifically set up or claimed under the Constitution . . . of . . . the United States."

CONSTITUTIONAL PROVISIONS RELIED UPON

CONSTITUTION OF THE UNITED STATES

AMENDMENT V

[Rights of Accused in Criminal Proceedings]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any

person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT VI

[Right to Speedy Trial, Witnesses, etc.]

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

AMENDMENT XIV

Section 1.

[Citizenship Rights Not to be Abridged by States]

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State where they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any

person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

THE PROCEEDINGS BELOW

Roger D. Bradley, the Petitioner herein, was a member of the Parkersburg, West Virginia, City Police Department and President of the Fraternal Order of Police in Parkersburg, West Virginia, at the time the crimes charged in the Indictment were alleged to have occurred. In the course of his duties as a police officer, the Petitioner became acquainted with a lady named Peggy Lamp who was well known to many members of the Parkersburg City Police Department due to her periodic arrests for public intoxication and her participation in domestic disputes. On December 17, 1992, Petitioner was indicted in a ten (10) count Indictment alleging violations of *West Virginia Code, 61-5A-3.* The Indictment charged that Petitioner, on four (4) separate occasions, accepted, or agreed to accept, from Peggy Lamp "sexual favors" in consideration for the Petitioner's violation of a legal duty as a public servant, i.e., bribery. (Counts One, Three, Five, Seven and Nine) In alternate Counts, the Indictment charged that Petitioner accepted a benefit from another person as consideration for his official action as a police officer. (Counts Two, Four, Six, Eight and Ten)

Due to the fact that the State's primary evidence against the Petitioner was three (3) tape-recorded telephone conversations (all of which were initiated by Peggy Lamp) Petitioner's trial counsel in pre-trial

motions attempted to exclude those tape-recorded telephone conversations from evidence. A hearing was held before the Trial Court on March 24, 1993, but the Trial Court deferred ruling upon the admissibility of the tape-recorded telephone conversations until trial.

The Petitioner's trial began as scheduled on March 29, 1993. Prior to jury selection an *in camera* suppression hearing upon the sole issue of the authenticity of the tape-recorded telephone conversations was held. The Trial Court again deferred ruling upon the Petitioner's request that the tape-recorded telephone conversations be excluded from evidence, stating that their admissibility would be ruled upon when they were offered into evidence by the State during trial.

The Petitioner's trial concluded on April 6, 1993, when the jury, after approximately fifteen (15) hours of deliberations over a two-day period found the Petitioner Not Guilty of all Counts of the Indictment *except* Count Seven and as to that Count the jury returned a verdict of Guilty.

On April 26, 1993, Petitioner's trial counsel filed a *Motion For Judgment of Acquittal, or Alternatively, Motion For New Trial,* setting forth fifteen (15) specific grounds upon which the Trial Court had erred. The Trial Court denied this post-trial motion the following day without affording the Petitioner or his trial counsel the opportunity to appear and argue the Motion. On June 22, 1993, the Petitioner appeared before the Trial Court for sentencing. Pursuant to *West Virginia Code, 62-12-7a,* the Trial Court deferred sentencing and committed the Petitioner

to the Diagnostic and Classification Unit at the Huttonsville Correctional Center. After his return from the Huttonsville Correctional Center, forty-four days later, the Petitioner was "committed for a period of not less than one (1) nor more than ten (10) years" to the West Virginia State Penitentiary for Men at Moundsville, West Virginia. The Petitioner's request for probation was denied.

On December 22, 1993, a Petition For Appeal was filed in the West Virginia Supreme Court of Appeals, which Petition was refused by that Court on May 3, 1994. On May 12, 1994, the West Virginia Supreme Court of Appeals granted Petitioner a Stay of Execution of the aforesaid sentence in order that he could file this Petition for Writ of Certiorari.

STATEMENT OF FACTS

On September 10, 1991, an individual named Harry Clayton contacted F.B.I. Agent Bruce Rupert and told him that he had a "situation" that he wanted to bring to his attention and it involved Peggy Lamp possibly performing sexual favors for a police officer. Agent Rupert went to Clayton's residence where he met with Clayton and Ms. Lamp and received from Clayton and/or Ms. Lamp a cassette tape containing a tape-recorded telephone conversation between the Petitioner and Ms. Lamp. Acting at the direction of Agent Rupert, Ms. Lamp initiated two (2) additional telephone calls to the Petitioner at the Parkersburg City Police Department which were also tape-recorded. After the F.B.I. declined to pursue any Federal

charges against the Petitioner, the Prosecuting Attorney of Wood County, West Virginia, employed a private investigator to investigate the accusations made against the Petitioner. That investigation culminated in the return of the Indictment.

During the pre-trial hearing and *in camera* hearings concerning the admissibility of the tape-recorded telephone conversations, it was determined that F.B.I. Agent Rupert did not have any written consent from Ms. Lamp to intercept the second and third telephone conversations. Ms. Lamp did not testify, either during the pre-trial hearings or the trial itself, that she gave her prior consent to the interception of the telephone conversations. During the *in camera* hearing it was revealed that Clayton had been arrested many years previously by former members of the Parkersburg City Police Department and convicted of armed robbery. Clayton's arrest and convictions were subsequently overturned and he obtained a substantial monetary settlement for false imprisonment. Clayton, however, denied any ill-will towards the Parkersburg City Police Department although he acknowledged that he had given information concerning the accusations against the Petitioner to local news media after the F.B.I. had declined to pursue charges against the Petitioner. Clayton testified that he intercepted the first telephone conversation and after discussing the matter with Ms. Lamp and receiving "the impression that she wanted to have it investigated", he contacted the F.B.I. and gave the cassette tape to Agent Rupert.

As noted above, the Trial Court deferred ruling upon the admissibility of any of the intercepted telephone conversations, stating that such ruling would be made "after

there has been some showing, if there ever is, of *quid pro quo*, and the tapes would then be admissible only for the purpose of corroborating, but not proving, the *quid pro quo.*" During the *voir dire* of prospective jurors the following remark was made by the Trial Court in the presence and hearing of the entire venire:

> "We are going to take a recess now. I want to try to get a jury sworn in this evening so that those who aren't needed will not come back. This *is costing the state a fortune* so we will excuse you for a brief time until we give counsel an opportunity to consider their strikes."

The trial began after a jury of three men and nine women were selected and sworn. The State's first witness, Ms. Lamp, gave testimony concerning various times when she performed oral sex upon the Petitioner at the Wood County Correctional Center when she was a prisoner, at the Wood County Magistrate Court when she was there for a court appearance, in the front seat of the Petitioner's unmarked police car when he was giving her a ride home following her release from jail, in the front seat of the Petitioner's unmarked police car while it was parked near a high school, and at her apartment when the Petitioner came there to investigate a malicious assault that she had witnessed in her neighborhood. When it became evident that the State was going to elicit testimony from Ms. Lamp concerning the tape-recorded telephone conversations, the admissibility of which had yet to be ruled upon, Petitioner's trial counsel, in chambers, asked the Trial Court to insure that Ms. Lamp make "no mention whatsoever even of the existence of the tapes . . . until they are ruled on in terms of admissibility,"

because "if they are referred to and then not admissible", it would be prejudicial error. The Trial Court immediately overruled this request and stated:

> "Well, a reference to the tape is not an admission of the tape into evidence. We haven't reached that point. It is my opinion that there has been evidence of a *quid pro quo* at this point so, as far as I know, as far as I can see from here, *the tapes will probably be admissible,* but they haven't been offered so we are not at the point where you are objecting to their admissibility, at this point."

The testimony of Ms. Lamp resumed before the jury and the following was heard:

> PROSECUTOR: Peggy, I think we had reached the point where I was asking you whether Harry Clayton, after you told him about this, had suggested that you do anything.
>
> MS. LAMP: He said, "What do you want to do, Peggy?" and I said, "I don't know." And I said, "I don't want to talk about it," because he kept asking me questions, you know, what happened and stuff like that. And I tried my hardest to put it out of my head. I didn't want to think about it.
>
> Q. Did he suggest that you do anything?
>
> A. He said something to the effect, like, "Well, you can't just forget about it." And I said, "I just want to forget about it." And then I went home because he kept harping on the subject, and I didn't want to talk about it. And then the next time was when I was contacted.
>
> Q. By whom?
>
> A. The FBI.

As stated above, Ms. Lamp *never* testified that she gave her prior consent, either verbally or in written form, to the interception of the telephone conversations by either Clayton or F.B.I. Agent Rupert. Harry Clayton, called as a witness by the State, testified that the first intercepted telephone conversation was made by Peggy Lamp from his residence and that he tape-recorded the conversation. Clayton testified that he listened to the tape "maybe two or three times" and then gave it to Agent Rupert a day or two later. Agent Rupert, also testifying on behalf of the State, testified that he, after being contacted by Clayton in September of 1991, went to Clayton's residence and received from Clayton the cassette containing the first intercepted telephone conversation. Rupert testified that after listening to that cassette tape he obtained a *signed consent* from Lamp and Clayton and tape-recorded two additional telephone conversations between Lamp and the Petitioner. During the *in camera* hearing concerning the admissibility of the tape-recorded telephone conversations Agent Rupert, under cross-examination by Petitioner's trial counsel and when asked if he had a *signed consent,* testified as follows:

> AGENT RUPERT: Okay. I do not have to have that written consent to make that tape. I made a mistake. It would be administratively, they would come back on me for not having that written consent signed. But I believe, under the law, if we went in and, as we are having this hearing today –
>
> MS. PYLES: Excuse me, agent. I would object and move to strike the witness' answer as non-responsive to my question.

> THE COURT: Well, I understand what the law is, anyway, Miss Pyles, *so it doesn't make any difference.*

During the trial testimony of Agent Rupert the State offered the three tape-recorded telephone conversations into evidence and Petitioner's trial counsel renewed all previous objections to their admission into evidence but the Trial Court overruled those objections, admitted the tapes into evidence, and advised the State that the tapes could be played for the jury.

The Petitioner's defense to the charges against him was that Ms. Lamp was not a credible witness and had been coerced and threatened by Clayton to make and pursue her accusations against the Petitioner. Testimony was presented from the Mayor and the Chief of Police of the City of Parkersburg, West Virginia, to the effect that Ms. Lamp was known to be an untruthful person. Further, four (4) Parkersburg City Police Officers who had arrested Ms. Lamp on various occasions after her accusations were related to Agent Rupert testified that she had told each of them, on different occasions, that she had "set up" the Petitioner and that she had been threatened by Clayton if she did not follow through with her accusations and prosecute the Petitioner. Also, testimony was presented from Sgt. R. L. Woodyard of the Wood County Sheriff's Department concerning a statement that Ms. Lamp had made to him while he and a female civilian employee of the Sheriff's Department were transporting Ms. Lamp from jail to Court. Sgt. Woodyard testified that Ms. Lamp, without being prompted, stated that her accusations against the Petitioner were fabricated.

The Petitioner testified in his own behalf, denying all but one of the "sexual encounters" described by Ms. Lamp. The Petitioner admitted that, on one occasion, Ms. Lamp and he had engaged in sexual intercourse but that this encounter occurred when he was "off duty" and had nothing at all to do with his duties as a police officer. The one incident admitted by the Petitioner occurred on or about the date encompassed by Count Seven of the Indictment.

The State's theory of prosecution in this case was that the Petitioner, in return for the sexual favors described by Ms. Lamp, had arranged for her to receive lenient punishment for the various minor criminal offenses for which she had been arrested or, in the alternative, he had arranged for charges to be dismissed or not issued at all. The Petitioner presented into evidence records from the Wood County Magistrate Court which revealed that the punishment received by Ms. Lamp was consistent with the punishment received by other persons charged with the same or similar offenses from 1989 through March 1, 1993.

Also testifying on behalf of the Petitioner was Arlis Roscoe Lamp, father of Peggy Lamp. Mr. Lamp testified that in November or December of 1991, the Petitioner came to his residence "looking for Peggy" and told him to tell Peggy that "there wasn't no warrants against her." This testimony was in response to, and contradictory of, Ms. Lamp's testimony that the Petitioner had often told her that there were charges pending against her when, in fact, no such charges existed.

In the State of West Virginia generally, and in the Circuit Court of Wood County, West Virginia, in particular, the Trial Court uses a "connected charge" to instruct

the jury. Into this connected charge are inserted instructions of law prepared by counsel for the parties defining the elements of the crime or crimes charged and any defenses relied upon by the accused. In this case the Prosecuting Attorney offered to the Trial Court "State's Instruction No. 1" which defined the offenses charged in the Indictment and the elements of each offense. This instruction was refused by the Trial Court and he then *himself* prepared an instruction defining the charges which was given to the jury over the objection of Petitioner's trial counsel. In closing arguments Petitioner's trial counsel gave special emphasis and attention to the instruction defining the crime, with special attention and reliance upon the Trial Court's explanation of the elements of each offense. Specifically, Petitioner's trial counsel reminded the jury that it was necessary, under the Trial Court's instruction, that it be proven that the Petitioner "solicit *and* agree" to accept sexual favors from Ms. Lamp in return for violating his duty as a police officer.

When the final arguments of counsel were completed the Trial Court gave the jury a series of informal and unwritten instructions concerning how they might conduct their deliberations. These post-argument instructions cover approximately three and one-half pages of the Trial Transcript. With reference to the Court Bailiff the Trial Court told the jury:

> If you need anything at all, please call on the Bailiff. He is there for your convenience to help you. He is the guy that will tell you what to do, what you can't do, if you have questions about it. On the other hand, you can tell him what you want to do and don't want to do.

During the second day of deliberations the Trial Court summoned counsel and the Petitioner into his chambers where he informed them that the Bailiff, without consulting him, had given the jury a Webster's Dictionary. The Trial Court informed counsel that he did not know what word or words the jury was looking up. Petitioner's trial counsel suggested to the Trial Court that he, by some appropriate means, attempt to ascertain what information the jury was seeking in the dictionary and suggested that the jury be instructed that they were not permitted to have any information other than what they were given in the courtroom. The Trial Court's response to this suggestion, apparently directed at the Prosecuting Attorney, was:

> What do you say? I don't have a strong feeling one way or the other about it. *I don't care.* A jury, of course, is to use their common ordinary sense. They do have information other than what is in the trial. They have for instance what words mean. In the contents of this, I mean, common ordinary meaning words is something that they do bring with them, and a dictionary is no more or less than a compilation of what those common ordinary words mean.

Immediately after this statement it was discovered that the dictionary was *still in the jury room* and the Trial Court told the Bailiff to "get the dictionary". The Bailiff exited chambers and returned very quickly, with the dictionary, and made the following statement:

> Okay. They are going to ask you another question here in a minute. They are writing it out, if you want to just hang tight.

At 11:15 a.m. the jury's question was delivered to the Trial Court and it was then discovered, for the first time, that there was a typographical error in the instruction prepared by the Trial Court wherein the elements of the various offenses were set forth. It was determined that the word "and" was used where the word "or" should have been used and the jury, or some member of the jury, had discovered the apparent error. The Prosecuting Attorney asked the Trial Court if he was "just going to correct it and send it back" at which point Petitioner's trial counsel said that she "would object to any change in the instruction." When it became apparent that the Trial Court intended to change the instruction by substituting "or" for "and" the Petitioner's trial counsel strenuously objected, moved for a mistrial (which was immediately denied), asked that the entire charge be re-read to the jury or, in the alternative, that she be permitted to re-argue the case since the change that the Trial Court was going to make to the instruction significantly changed the meaning of the entire instruction and severely undercut the closing argument that she had made to the jury. This request of Petitioner's trial counsel, made promptly and before the Trial Court had any communication with the jury concerning the typographical error, was denied.

The jury continued to deliberate until 9:08 p.m. that evening and during that time sent to the Trial Court two (2) additional written communications. At 12:35 p.m. the jury inquired as to whether the Petitioner was, or was not, a "public servant" when he was off duty. The Trial Court refused to answer this inquiry, stating that "it is irrelevant". At 3:10 p.m. the jury informed the Trial Court that it was "hopelessly deadlocked" and the Trial Court,

over the objection of Petitioner's trial counsel, gave to the jury the *Allen* instruction at 3:15 p.m. At 8:07 p.m. the Trial Court once again summoned counsel and the Petitioner into his chambers and told them that he intended to bring the jury into the courtroom at 8:30 p.m. to see if they were making any progress in their deliberations. When the jury was brought in at 8:32 p.m. the foreman of the jury informed the Trial Court that the jury was making progress in its deliberations and wanted to deliberate until 9:00 p.m. and, if necessary, return the following day. At 9:08 p.m. the jury returned the verdicts described above.

ARGUMENT

I. DENIAL OF THE RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL AND TO HAVE COUNSEL MAKE A CLOSING ARGUMENT ON THE LAW APPLICABLE TO THE CASE (SIXTH AMENDMENT)

As noted above, the Trial Court refused the instruction prepared by the Prosecuting Attorney wherein the charges against the Petitioner were defined and the elements listed, giving in its place, over the objection of Petitioner's trial counsel, an instruction prepared by the Trial Court. Petitioner's trial counsel objected to the giving of that instruction upon several grounds including, but not limited to, *the ground that it did not conform with the statutory definition of the crimes.* When the Trial Court made it clear that the instruction would be altered after the jury had deliberated for many hours Petitioner's trial

counsel very specifically informed the Trial Court of her desire to re-argue the case because the change in the language of the instruction had the effect of negating an important part of her closing argument. A somewhat similar situation arose in *Loveless v. United States*, 260 F. 2d 487 (C.A.D.C. 1938), a case in which the defendant was charged with second degree murder and convicted of manslaughter. At the close of the evidence the defendant requested that the trial court instruct the jury as to the lesser-included offense of manslaughter but the trial court refused to do so. After counsel had given their closing arguments the trial court advised counsel that "he had changed his mind" and had decided to instruct the jury with regard to manslaughter. 260 F. 2d at 487. The defendant's counsel promptly objected, informing the trial court that "neither of us, in view of what your honor said, argued with respect to manslaughter at all." 260 F. 2d at 487-488. In spite of the fact that the defendant was convicted of manslaughter, and thus the trial court's refusal to permit further argument may have been harmless, the Court of Appeals set aside the verdict and remanded the case for a new trial, holding that "the least that could have been done to comply with [Rule 30 of the Federal Rules of Criminal Procedure] was to afford counsel an opportunity to re-open and argue the issue of manslaughter." 260 F. 2d at 488.

The Constitutional issue involved in denying closing argument in a criminal case was discussed in *United States v. Walls*, 443 F. 2d 1220 (C.A. 6, 1971) where, in a non-jury trial, the trial court, at the completion of the evidence, immediately found the defendant guilty without giving his counsel an opportunity to make a closing

argument. 443 F. 2d at 1222. The Court of Appeals reversed the conviction in *Walls*, holding that: "Preclusion of closing argument denied appellant the effective assistance of counsel." 443 F. 2d at 1223.

The Constitutional issue referred to in *Walls, supra,* was given a thorough discussion by this Court in *Herring v. New York,* 422 U.S. 853, 45 L.Ed. 2d 593, 95 S.Ct. 2550 (1975). In *Herring* this Court held that a New York Statute which made final arguments discretionary in non-jury criminal cases was unconstitutional because it denied the accused the effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution. In reaching this decision, this Court noted that closing argument for the defense is a "basic element of the adversary fact finding process" and that it had been held that defense counsel "has a right to make a closing summation to the jury, no matter how strong the case for the prosecution may appear to the presiding judge." 422 U.S. at 858, 45 L.Ed. 2d at 598. This Court cited with approval a Maryland appellate decision, *Yopps v. State,* 228 Md. 204, 178 A. 2d 879 (1962) and quoted the following language therefrom:

> The Constitutional right of a defendant to be heard through counsel necessarily includes his right to have his counsel make a proper argument on the evidence *and the applicable law* in his favor, however simple, clear, unimpeached, and conclusive the evidence may seem, unless he has waived his right to such argument, or unless the argument is not within the issues in the case, and the trial court has no discretion to deny the accused such right. 228 Md. at 207, 178 A. 2d at 881 (Emphasis added)

A somewhat different situation was discussed in *Wallis v. State,* 546 S.W. 2d 244 (Tenn. 1977) but the same result was reached. In *Wallis* the defendant's counsel waived closing argument for strategic reasons after the prosecutor made a short argument to the jury in which he did not comment upon the facts of the case. The trial court then stated that the prosecution would still be permitted to "close the arguments" and gave the defendant's counsel an opportunity to reconsider his waiver. The prosecutor then presented a closing argument to the jury which was three times longer than his opening argument in which he "competently, effectively, scathingly, and specifically attacked the appellant, his witnesses, and the defense theory, at the same time pointing out the meritorious reasons why the jury should accept the State's proof and its theory." 554 S.W. 2d at 246. The defendant's counsel then requested the opportunity to make a rebuttal argument but his request was denied. The conviction in *Wallis* was reversed, the Tennessee Court holding that the defendant's right to be heard by this counsel had been abridged, and the defendant prejudiced thereby. 546 S.W. 2d at 248.

In *United States v. King,* 650 F. 2d 534 (C.A. 4, 1981) the defendant was convicted by a United States Magistrate for obstructing an entrance to the Pentagon during an anti-war protest. At the close of the evidence the Magistrate immediately reviewed the evidence and promptly found the defendant guilty. The defendant's counsel then advised the Magistrate that he had not waived closing argument. The Magistrate informed defense counsel that he could make a closing argument but: "It's not going to change anything, . . . " 650 F. 2d at

536. The Court of Appeals reversed the conviction because of the denial of a closing argument for the defendant.

It appears that this precise issue has never been addressed in any opinion of the West Virginia Supreme Court of Appeals. However, the West Virginia Supreme Court of Appeals has held that:

> The discretion of the trial court in ruling on the propriety of argument by counsel before the jury will not be interfered with by the appellate court, unless it appears that the rights of the complaining party have been prejudiced, or that manifest injustice resulted therefrom. Syllabus point 3, *State v. Boggs*, 103 W. Va. 641, 138 S.E. 321 (1927)

Before the Trial Court gave the instruction that was later changed, Petitioner's trial counsel objected to the giving of that instruction because *it did not conform to the statutory language*. Nonetheless, Petitioner's trial counsel made an effective and incisive closing argument relying upon the language contained in the instruction. When the Trial Court, after the jury had deliberated for many hours, changed the word "and" to "or" this dramatically changed the meaning of the entire instruction and undercut the argument made to the jury by Petitioner's trial counsel. The Sixth Amendment right to the effective assistance of counsel includes the right to have counsel make an argument in conformity with the law that the jury is told to follow. In this case the Petitioner has been denied that very important Constitutional guarantee.

II. THE DENIAL OF THE DUE PROCESS OF LAW BY THE ADMISSION INTO EVIDENCE OF TAPE-RECORDED TELEPHONE CONVERSATIONS THAT WERE INTERCEPTED IN VIOLATION OF APPLICABLE STATE LAW

In this case the State relied heavily upon the tape-recorded telephone conversations between the Petitioner and Ms. Lamp. They were played in their entirety for the jury during the State's case-in-chief and were partially replayed during cross-examination of the Petitioner. During closing arguments the Prosecuting Attorney quoted at length from a transcript made of the tapes. Finally, the tapes and a tape player were in the jury room throughout jury deliberations and the jury no doubt listened to them again.

The *interception* and *disclosure* of wire, oral, or electronic communications is made illegal by *West Virginia Code, 62-1D-3, unless* such interception or disclosure falls within one or more of the exceptions set forth in Article 1D of Chapter 62 of the *West Virginia Code.* One such exception is contained in *West Virginia Code, 62-1D-3(c)(2),* which makes it lawful for a person to *intercept* such communications "where the person is a party to the communication or where one of the parties to the communication has given prior consent to the interception . . . " *West Virginia Code, 62-1D-6,* provides, in part, that "evidence obtained in violation of the provisions of this article shall not be admissible in any proceeding." *West Virginia Code, 62-1D-9(b),* provides, in part, that a law enforcement officer "who has obtained knowledge of the contents" of an intercepted communication may utilize the contents thereof in the proper performance of his

duties *provided,* however, that he obtained "such knowledge by *lawful disclosure* . . . " (Emphasis added)

In this case the Trial Court was obviously confused or uninformed as to the legal prerequisites for the admission of such evidence. In pre-trial proceedings the State cited to the Trial Court, and relied upon, the case of *State v. Garrett,* 182 W. Va. 166, 386 S.E. 2d 823 (1989) arguing that the tape-recorded conversations were admissible. In *Garrett* the tape was made *by the defendant himself,* before he was arrested, for the purpose of "telling his side of the story." 386 S.E. 2d at 833. The tape recording in *Garrett* did not involve a telephone call or any other electronic communication but, rather, was a tape-recorded statement that the defendant himself made on a tape recorder.

In this case the telephone conversations involved two parties, Peggy Lamp and the Petitioner, and neither of them testified that any *prior* consent to the interception of the telephone conversations was given. Agent Rupert admitted, during the *in camera* hearing, that he did not have a signed consent from Ms. Lamp. The testimony of Harry Clayton reveals, quite clearly, that the first telephone conversation was intercepted without Ms. Lamp's prior knowledge or consent.

Petitioner's trial counsel forcefully and repeatedly objected to the introduction of the tapes into evidence, calling to the Trial Court's attention the obvious fact that the telephone calls had not been intercepted in accordance with the requirements of either Federal or State law. The Trial Court's response to what was actually a very well-founded objection was: "Well, I understand what the law is, anyway, Ms. Pyles, *so it doesn't make any*

difference." In fact, the Trial Court did not know what the law was and his lack of familiarity with the law resulted in evidence being admitted against the Petitioner which was obtained in flagrant violation of the law.

III. THE DENIAL OF A FAIR AND IMPARTIAL TRIAL BY THE TRIAL COURT'S CONCERN WITH THE COST TO THE STATE OF THE TRIAL (FOURTEENTH AMENDMENT)

During the jury selection process, and while all prospective jurors were present the Trial Court made reference, needlessly, to the cost involved in the Petitioner's trial, stating: "This is costing the State a fortune . . . " There was no purpose for such a comment to be made and certainly no purpose for such a comment to have been made in the presence of the venire. The effect that this remark by the Trial Court may have had upon the trial and the Petitioner's rights can best be considered in light of what has been written about the controversial and often criticized *Allen* instruction. After the jury had informed the Trial Court that it was "hopelessly deadlocked" the jury was given an *Allen* instruction which again made reference to the cost involved in conducting the trial. The form of the *Allen* instruction as given by the Trial Court was *not* in the form recommended by the "A.B.A. Project of Minimum Standards For Criminal Justice, Section 5.4 (1968) and Supplement to Report of the Committee on The Operation of the Jury System of the Judicial Conference of the United States (1969).

The *Allen* instruction utilized by the Trial Court is in the form which is regularly judicially criticized. What effect reference to *cost* of the trial at the beginning of the trial and again at the end of the trial may have had on the juror's deliberations is unknown, but clearly an effect adverse to Petitioner's Constitutional guarantees is not without possibility, if not probability.

Indications of judicial dissatisfaction and thought on the *Allen* instruction are abundant. See: *United States v. Bonham*, 772 F. 2d 1449 (C.A. 9, 1985); *United States v. Stollings*, 501 F. 2d 954 (C.A. 4, 1974); *United States v. Sawyers*, 423 F. 2d 1335 (C.A. 4, 1970).

Certainly, if the giving of the *Allen* instruction at the usual place in a trial, after long jury deliberation, has been seriously questioned by appellate courts, the giving of what could be considered a part of such an instruction at the outset of a trial needs to be considered improprietous and prejudicial as to the right of the Petitioner to a fair and impartial trial.

IV. THE DENIAL OF A FAIR AND IMPARTIAL TRIAL, AND JURY DELIBERATIONS BASED ONLY UPON EVIDENCE WITH WHICH THE PETITIONER WAS CONFRONTED IN OPEN COURT, BY THE JURY'S UNAUTHORIZED USE OF A DICTIONARY DURING DELIBERATIONS

An examination of the Record in this case will demonstrate, without any question, that the Trial Court exercised very little, if any, control over the jury during deliberations. The Trial Transcript reveals that the jury came and went at its pleasure for lunch, breaks, and so

forth. Also, the jury had a very peculiar relationship with the Court Bailiff who was introduced by the Trial Court to them as "the guy that will tell you what to do, what you can't do, if you have questions about it." It is a peculiar circumstance that the Court Bailiff knew, after retrieving the Webster's Dictionary from the jury room, that the jury was, *at that time*, writing another note to send to the Trial Court. This state of affairs, in the absence of any record as to what was *actually* transpiring between the Court Bailiff and the jury, gives rise to a very strong suspicion that the Court Bailiff was somehow participating in the deliberative process.

It has been stated that the use of a dictionary by jurors during deliberations constitutes consideration of extraneous and incompetent evidence. In some jurisdictions the view is followed that a dictionary inherently tends to influence a jury in a manner inconsistent with the proof at trial and the trial court's instructions, and thus *a presumption of prejudice arises* from reference by jurors to dictionaries generally. 75B Am.Jur. 2d *Trial* Sections 1560 and 1561.

In a Virginia case, *Brittle v. Commonwealth*, 281 S.E. 2d 889 (1981) the defendant was found guilty of murder in the first degree. On appeal he claimed prejudice because 90 unintroduced color photographs were mistakenly sent to the jury room during the deliberations. The Commonwealth took the position that this was harmless error because 48 of the 90 photographs were duplicates of other photographs that were properly introduced and that the remaining 42 photographs were of "irrelevant and immaterial subject matter surrounding the crime scene, such as a doorway, wall, bedroom, . . . " 281 S.E. 2d at 890. The

Virginia court disagreed and reversed the conviction, holding:

> A juror may not properly receive any information about a case he is hearing except in open court and in the manner provided by law. * * * The reception of any evidence by the jury, especially in a criminal case, in addition to that produced at trial is ground for setting aside the verdict whenever there is sufficient ground to believe that one of the parties in a civil suit, or an accused in a criminal case, has been prejudiced by receipt of the information. * * * And the test in a criminal case is not whether the jurors were actually prejudiced by the extraneous matter, but whether they might have been so prejudiced. If they might have been prejudiced, then the purity of the verdict is open to serious doubt and the verdict should be set aside and a new trial awarded. 281 S.E. 2d at 890.

If any part or portion of a criminal trial should be free from even the slightest suspicion of impropriety, that part or portion is the jury's deliberations. In this case the jury's deliberations are subject to question because of their use of the dictionary and the lack of any record concerning what communication the Bailiff may have been having with the jury.

CONCLUSION

The Petitioner in this case has been deprived of his Constitutional rights and denied a fair and impartial trial because:

> A. The Trial Court, despite a proper and timely request, refused to allow Petitioner's trial counsel to re-argue the case after the Trial Court

had changed an instruction previously given to the jury and after the jury had been deliberating for many hours. This action by the Trial Court deprived the Petitioner of his right to have his trial counsel make a closing argument on his behalf in conformity with the law applicable to the case.

B. The tape-recorded telephone conversations were intercepted in violation of applicable State law and should not have been admitted into evidence.

C. The Trial Court's reference to and comment upon the cost of the trial to the State was improper, unnecessary, and conveyed to the jury a message that they were to reach a verdict whether supported by the evidence or not.

D. The jury's use of a dictionary during deliberations raises a presumption of prejudice and, also, involves the introduction of extraneous matter to the jury in violation of the Confrontation Clause of the Sixth Amendment to the United States Constitution.

Dated: July 28, 1994

ROGER D. BRADLEY, Petitioner

By Counsel.

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STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 3rd day of May, 1994, the following order was made and entered:

State of West Virginia, Plaintiff
Below, Respondent

vs.) No. 940102

Roger D. Bradley, Defendant Below,
Petitioner

On a former day, to-wit, February 8, 1994, came the petitioner, Roger D. Bradley, by William E. Kiger and Elizabeth Pyles, his attorneys, and presented to the Court his petition praying for an appeal from a judgment of the Circuit Court of Wood County, rendered on the 27th day of August, 1993, with the record therein accompanying the petition. Previously, on the 24th day of January, 1994, came the respondent, the State of West Virginia, by Michele Rusen, Prosecuting Attorney for Wood County, its attorney, and presented to the Court its written response in opposition thereto.

Upon consideration whereof, the Court is of opinion to and doth hereby refuse said petition for appeal. Chief Justice Brotherton and Justice Neely would grant.

A True Copy

/s/ Ancil G. Ramey
Clerk, Supreme Court of Appeals

At a Circuit Court continued and held for Wood County at the Court House thereof on August 27, 1993.

IN THE CIRCUIT COURT OF WOOD COUNTY, WEST VIRGINIA

STATE OF WEST VIRGINIA,

Plaintiff,

vs.

CASE NO. 92-F-129

ROGER D. BRADLEY,

Defendant.

ORDER

ROGER D. BRADLEY, who was found guilty of the offense of bribery in official and political matters on April 6, 1993, on August 27, 1993, appeared at the bar accompanied by his counsel, and also appeared the State of West Virginia by the Prosecuting Attorney for Wood County, West Virginia.

Whereupon, it being demanded of defendant if he had anything to say why the court should not now proceed to pronounce judgment and sentence upon him according to law and nothing being offered or alleged in delay of judgment, it is ADJUDGED and ORDERED by the court that the defendant be committed for a period of not less than one (1) year nor more than ten (10) years to the West Virginia Department of Corrections for confinement in the penitentiary, fined court costs and given credit for 44 days previously served.

The court has before it the reports of the special probation officer of this court and the psychologist of the Diagnostic and Classification Unit at Huttonsville Correctional Center; and having thoroughly considered said reports and recommendations and all the circumstances of this case, it is the opinion of the court that it is in the best interests of the community and the State of West Virginia to deny said motion.

Thereupon, counsel for the defendant moved for stay of execution of sentence for purposes of appeal; and the court hereby grants a 60-day stay and enlargment of the existing bond.

ENTER:

/s/ George W. Hill
George W. Hill, Judge

A Copy Teste:

/s/ Carole Jones
Clerk of the Circuit Court
Wood County, West Virginia

By: /s/ D.S. Wines Deputy